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ENCONY DEVELOPMENT SDN BHD v. ROBERT GEOFFREY GOOCH & ANOR

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
VARGHESE GEORGE JCA
B NALLINI PATHMANATHAN JCA
[CIVIL APPEAL NO: P-02(NCVC)(W)-14-01-2014]
21 JULY 2015

C ***LAND LAW:*** *Housing developers – Sale and purchase agreement ('SPA') – Condominium unit – Termination due to plaintiffs' failure to make progressive payments – Whether progress payments only payable when defendant made good its representations of date of completion of project – Whether there was a collateral contract subsisting – Whether collateral contract could subsist alongside statutory form of contract as prescribed under reg. 11 of Housing Development (Control and Licensing) Regulations 1989 in Schedule H – Whether collateral contract in direct* D *conflict with express terms of SPA – Whether statutory form SPA executed subsequent to oral representations – Whether defendant agreed to defer progress billing until representations of collateral contract fulfilled – Whether failure to make progress payments amounted to fundamental breach of agreement – Whether defendant entitled to terminate SPA – Evidence Act 1950, s. 91*

E ***LAND LAW:*** *Housing developers – Sale and purchase agreement ('SPA') – Terms thereof – Whether statutory in nature – Whether collateral contract could subsist alongside statutory form of contract as prescribed under reg. 11 of the Housing Development (Control and Licensing) Regulations 1989 in Schedule H – Whether collateral contract in direct conflict with express terms of SPA – Whether statutory* F *form SPA executed subsequent to oral representations – Whether defendant agreed to defer progress billing until representations of collateral contract fulfilled – Whether failure to make progress payments amounted to fundamental breach of agreement – Whether defendant entitled to terminate SPA – Evidence Act 1950, s. 91*

G The plaintiffs, who were citizens of Australia, intended to make Penang their second home under the Malaysia My Second Home programme. They engaged the services of property agents and were advised of several available properties. The plaintiffs corresponded with one Elaine Khoo ('Khoo'), who worked for a developer of a condominium project, with the view to purchasing a unit in 'One Ritz'. On 19 August 2010, the plaintiffs paid an H initial deposit of RM50,000 to secure the purchase of a unit in One Ritz. On 2 September 2010, a sale and purchase agreement ('SPA') was executed between the plaintiffs and the defendant. The plaintiffs then paid a balance 10% deposit of RM242,000. The defendant proceeded to issue progress payment requests as the building reached various stages of completion. I However, no further progress payments were made by the plaintiffs. On 21 September 2010, after the execution of the SPA, the plaintiffs wrote a letter to the defendant that was in itself a contradiction in terms as they

sought confirmation that the building would be completed by December 2010, while the SPA had stipulated the date of completion as being September 2013. The defendant subsequently issued a notice dated 12 November 2010 to the plaintiffs, advising that they were in breach of the SPA in that the plaintiffs failed to make payments due, amounting in total to RM1,898,000. As no response was received, the defendant proceeded to terminate the SPA. The plaintiffs' position in this regard was that the progress payments would only be paid when the defendant made good its representations by confirming the date of completion of the project, as well as providing them with the additional documents which they had sought prior to entry into the SPA. The defendant replied that no additional terms were acceptable other than that stipulated in the SPA. On 25 May 2011, the plaintiffs challenged the termination and maintained that they were shocked by the termination and the forfeiting of the deposit, which they held to be unlawful and unmerited. The defendant denied that there was ever any agreement in place to provide the plaintiffs with the additional documentation other than as specified in the SPA. The defendant also reiterated that the plaintiffs had failed to make progress payments due, which amounted to a default pursuant to cl. 10 of the SPA. The defendant therefore maintained that the termination was lawful and valid. The High Court Judge, however, held that the defendant's failure to call salient witnesses was fatal to the defendant's case, as a consequence of which the defendant was unable to rebut the plaintiffs' affirmative assertions relating to the representations and assurances given to them in relation to the sale and purchase of the property. As such, the High Court allowed the plaintiffs' case and the termination of the SPA was declared null and void. Hence, the defendant appealed against the said decision. The issues that arose were (i) whether a collateral contract could subsist alongside a statutory form of contract as prescribed under reg. 11 of the Housing Development (Control and Licensing) Regulations 1989 in Schedule H; (ii) whether the statutory form SPA was executed subsequent to the oral representations and assurances; (iii) whether the transaction between the parties was a standard sale and purchase agreement governed entirely by the provisions of the SPA; (iv) whether there was sufficient evidential basis to conclude that a collateral contract subsisted; (v) whether the defendant had agreed to defer the 'progress billing' until the representations and/or assurances or the collateral contract was fulfilled; (vi) whether the defendant was entitled to terminate the SPA and forfeit the deposit.

Held (allowing appeal with costs)
Per Nallini Pathmanathan JCA delivering the judgment of the court:

(1) The SPA between the plaintiffs and the defendant was governed by a statutory form of contract as prescribed in Schedule H of the Housing Development (Control and Licensing) Regulations 1989 ('the Regulations'). As such, the provisions in the SPA were not merely contractual, but were in effect statutory provisions. There was no

A evidential or legal basis to justify the existence of representations or assurances that sit alongside the statutory form SPA, and which were binding on the parties. There was no basis either evidentially or legally to warrant a finding that a collateral contract subsisted alongside the statutory form of contract that was the SPA. The SPA, which had
B statutory force, could not be effectively amended or varied by inferring the existence of a collateral contract subsisting alongside it. The terms of the collateral contract (*ie*, the representations) were in direct conflict with the express terms of the SPA. In these circumstances, it was untenable to maintain that the collateral contract prevailed over the
C statutory form contract, effectively amending and varying its content. Neither were the plaintiffs and the defendant entitled to vary or import any other terms or provisions of law in the construction of this statutory form of the SPA. (paras 41, 42, 45 & 46)

(2) Significantly, the representations and assurances or collateral contract
D that the plaintiffs sought to rely upon were premised primarily on events which occurred prior to the execution of the SPA. The plaintiffs had freely executed the statutory form of SPA on 2 September 2010, subsequent to the oral representations and assurances by Khoo that, *inter alia*, the building would be completed by the end of 2010. The terms of
E the SPA clearly and expressly contradicted the alleged collateral agreement or representations. The terms of the SPA, being subsequent to the representations and assurances, prevail and remain binding on the parties. As such, no effect could be given to any oral representation that the unit would be completed by either the end of 2010 or by April 2011. It was the time frame stipulated in the SPA that prevailed. (para 47)

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(3) The transaction between the parties was a standard sale and purchase agreement, which was governed entirely by the provisions of the SPA. Section 91 of the Evidence Act 1950 precludes the adducing of oral or parol evidence for the purposes of ascertaining the terms of the contract.
G It was solely the contents of the SPA that amount to admissible evidence to construe the terms of the contract between the parties. (para 48)

(4) There was a paucity of evidence to warrant the finding of a subsidiary or collateral contract. The total sum of evidence relating to the representations and assurances relied upon by the plaintiffs, comprised
H a single email from Khoo in August 2010 and oral representations prior to the SPA. These matters were insufficient to support the subsistence of a collateral agreement. The defendant had refused to concede to the existence of any collateral agreement when their representatives expressly stated that no such promise or assurance could be given. That
I could not amount to a collateral agreement. The representations made by Khoo prior to the SPA remained as oral representations, which were superseded by the binding terms of the SPA. It may have been exaggeration for the purposes of ensuring a sale, but it could not be

construed as a binding representation of the date of delivery of vacant possession since the said term was expressly set out in the SPA. As such, these representations ought not to be construed as comprising a part of, or collateral to the written agreement between the parties. (paras 49 & 50)

(5) There was certainly no agreement in place to the effect that progress payments would be deferred. On the contrary, the express terms of the SPA point to the fact that time was of the essence, that progress payments had to be made on time, and that failure to do so would amount to a default, warranting termination. Therefore, this contention of the plaintiffs, namely that payments due were deferred, was misconceived and lacked basis both evidentially and legally. (para 52)

(6) In the absence of any collateral contract or binding representation or assurance, and in the face of a binding statutory form SPA, the defendant was entitled to terminate the SPA for failure to comply with the progress billing demands. These demands were issued to the plaintiffs directly at the Australian address as specified in the SPA. There was no response to the invoices and notices issued for payment, which amounted to a clear breach of clauses in the SPA. As the breach was not rectified, the defendant proceeded to terminate the SPA strictly in accordance with cl. 10. The defendant ought not to be faulted for strict adherence to the terms of the SPA. The express terms of the SPA were binding. (paras 53 & 55)

Bahasa Malaysia *Headnotes*

Plaintif-plaintif, warganegara Australia, berniat menjadikan Pulau Pinang sebagai tempat tinggal kedua mereka di bawah Program Malaysia Rumah Keduaku. Mereka menggunakan khidmat ejen hartanah dan dinasihatkan berkenaan hartanah-hartanah yang sedia ada. Plaintif-plaintif berurusan dengan seorang yang bernama Elaine Khoo ('Khoo'), yang bekerja untuk pemaju satu projek kondominium, dengan tujuan membeli satu unit di 'One Ritz'. Pada 19 Ogos 2010, plaintif-plaintif membayar deposit permulaan sebanyak RM50,000 sebagai jaminan pembelian satu unit di One Ritz. Pada 2 September 2010, satu perjanjian jual beli ('PJB') dimeterai antara plaintif-plaintif dan defendan. Plaintif-plaintif membayar baki 10% deposit iaitu RM242,000. Defendan seterusnya mengeluarkan permintaan bayaran secara progresif setiap kali bangunan mencapai pelbagai peringkat penyiapan. Walau bagaimanapun, tiada bayaran progresif dibuat selanjutnya oleh plaintif-plaintif. Pada 21 September 2010, selepas pelaksanaan PJB, plaintif-plaintif menulis surat kepada defendan yang bercanggah dari segi terma kerana mereka menuntut pengesahan bahawa bangunan tersebut akan siap sebelum bulan Disember 2010, sedangkan PJB menetapkan tarikh siap pada September 2013. Defendan seterusnya mengeluarkan notis bertarikh 12 November 2010 kepada plaintif-plaintif, menyatakan bahawa mereka

telah melanggar PJB kerana gagal jumlah RM1,898,000. Oleh kerana tiada jawapan defendan terus menamatkan PJB. Kedudukan plaintif-plaintif berkenaan ini adalah bahawa bayaran progresif hanya akan dibuat apabila defendan memenuhi representasi mereka dengan mengesahkan tarikh siap projek, dan juga dengan membekalkan dokumen tambahan yang mereka tuntut sebelum memeterai PJB tersebut. Defendan menjawab bahawa tiada syarat tambahan boleh diterima selain yang ditetapkan dalam PJB. Pada 25 Mei 2011, plaintif-plaintif membantah penamatan dan menyatakan mereka terkejut dengan penamatan tersebut dan deposit yang dilucuthakkan, yang pada mereka menyalahi undang-undang dan tidak berasas. Defendan menafikan bahawa terdapat apa-apa persetujuan untuk membekalkan plaintif-plaintif dengan dokumen tambahan selain yang dinyatakan dalam PJB. Defendan juga menegaskan bahawa plaintif-plaintif gagal membuat bayaran secara progresif dan ini terjumlah sebagai keingkaran kl. 10 PJB. Defendan dengan itu menghujahkan bahawa penamatan tidak menyalahi undang-undang dan sah. Hakim Mahkamah Tinggi, walau bagaimanapun, memutuskan bahawa kegagalan defendan memanggil saksi-saksi penting menjejaskan kes defendan kerana defendan tidak dapat menyangkal dakwaan afirmatif plaintif berhubung dengan representasi-representasi dan jaminan yang diberikan kepada mereka berkenaan jualan dan belian hartanah itu. Oleh itu, Mahkamah Tinggi membenarkan kes plaintif-plaintif dan penamatan PJB diisytiharkan sebagai terbatal dan tidak sah. Dengan itu, defendan merayu terhadap keputusan tersebut. Isu-isu yang dibangkitkan adalah (i) sama ada kontrak kolateral boleh wujud bersama-sama dengan kontrak berbentuk statutori yang ditetapkan di bawah per. 11 Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Perlesenan) 1989 dalam Jadual H; (ii) sama ada PJB berbentuk statutori dilaksanakan selepas representasi dan jaminan lisan; (iii) sama ada transaksi antara pihak-pihak adalah satu perjanjian jual beli standard yang ditadbir sepenuhnya oleh peruntukan PJB; (iv) sama ada terdapat asas keterangan yang cukup untuk membuat kesimpulan bahawa satu kontrak kolateral wujud; (v) sama ada defendan bersetuju untuk menangguhkan 'bayaran progresif' sehingga representasi dan/atau jaminan atau kontrak kolateral ditunaikan; dan (vi) sama ada defendan berhak menamatkan PJB dan melucuthakkan deposit.

Diputuskan (membenarkan rayuan dengan kos)

Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:

(1) PJB antara plaintif-plaintif dan defendan dibuat selaras dengan kontrak berbentuk statutori dalam Jadual H Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Perlesenan) 1989 ('Peraturan-peraturan'). Dengan itu, peruntukan-peruntukan dalam PJB bukan sahaja kontraktual, tetapi adalah sebenarnya peruntukan statutori. Tiada keterangan dan asas undang-undang untuk mewajarkan kewujudan representasi atau jaminan yang selari dengan PJB berbentuk statutori,

dan yang telah mengikat pihak-pihak. Tiada asas sama ada ternyata atau secara undang-undang untuk mewajarkan dapatan bahawa satu kontrak kolateral wujud bersama-sama dengan kontrak berbentuk statutori iaitu PJB. PJB, yang mempunyai kuasa berkanun, tidak boleh dipinda atau diubah dengan membuat kesimpulan kewujudan kontrak kolateral yang wujud bersamanya. Terma-terma kontrak kolateral (iaitu representasi-representasi) bertentangan dengan syarat-syarat nyata PJB. Dalam keadaan ini, adalah tidak dapat dipertahankan bahawa kontrak kolateral mengatasi kontrak berbentuk statutori, dengan meminda dan mengubah kandungannya secara berkesan. Plaintif-plaintif dan defendan juga tidak berhak mengubah atau memasukkan terma-terma atau peruntukan-peruntukan undang-undang lain dalam konstruksi PJB yang berbentuk statutori ini.

(2) Nyata sekali, representasi dan jaminan atau kontrak kolateral yang dituntut oleh plaintif-plaintif adalah berdasarkan hal ehwal yang berlaku sebelum pelaksanaan PJB. Plaintif-plaintif telah melaksanakan PJB berbentuk statutori pada 2 September 2010, selepas representasi dan jaminan lisan oleh Khoo bahawa, antara lain, bangunan itu akan siap pada akhir tahun 2010. Terma-terma PJB dengan jelas dan nyata bertentangan dengan perjanjian kolateral atau representasi yang didakwa. Terma-terma PJB, yang dibuat selepas representasi dan jaminan, mengatasi dan kekal mengikat pihak-pihak terlibat. Dengan itu, tiada kesan boleh diberikan pada representasi-representasi lisan bahawa unit akan siap pada akhir tahun 2010 atau sebelum April 2011. Adalah tempoh masa yang wujud dalam PJB yang akan mengatasi.

(3) Transaksi antara pihak-pihak terlibat adalah satu perjanjian jual beli standard, yang ditadbir sepenuhnya oleh peruntukan PJB. Seksyen 91 Akta Keterangan 1950 menghalang keterangan lisan daripada dikemukakan bagi tujuan menentukan syarat-syarat kontrak. Kandungan PJB semata-mata yang menjadi keterangan boleh diterima untuk mentafsirkan syarat-syarat kontrak antara pihak-pihak terlibat.

(4) Terdapat kekurangan bukti untuk mewajarkan dapatan kontrak kolateral atau sambilan. Jumlah keseluruhan keterangan yang berhubungan dengan representasi-representasi dan jaminan-jaminan yang dirujuk oleh plaintif-plaintif, terdiri daripada satu emel daripada Khoo pada Ogos 2010 dan representasi-representasi secara lisan sebelum PJB. Perkara-perkara ini tidak mencukupi untuk menyokong kewujudan kontrak kolateral. Defendan enggan untuk mengalah kepada kewujudan mana-mana kontrak kolateral apabila wakil-wakil mereka dengan jelasnya menyatakan bahawa tiada janji atau jaminan seperti itu boleh diberi. Itu tidak terjumlah kepada perjanjian kolateral. Representasi-representasi oleh Khoo sebelum PJB kekal sebagai representasi lisan, yang digantikan dengan terma mengikat dalam PJB. Kata-kata tersebut mungkin keterlaluan bagi maksud memastikan jualan, tetapi ia tidak

boleh ditafsirkan sebagai pernyataan yang mengikat berkenaan tarikh penyerahan milikan kosong kerana terma tersebut dinyatakan dengan jelas dalam PJB. Oleh itu, representasi-representasi tersebut tidak boleh ditafsirkan sebagai terdiri daripada sebahagian, atau kolateral perjanjian bertulis antara kedua-dua pihak.

(5) Tiada persetujuan yang memberi kesan bahawa bayaran progresif akan ditangguhkan. Sebaliknya, syarat-syarat nyata PJB menunjukkan fakta bahawa masa amat penting, bahawa bayaran progresif harus dibuat tepat pada waktunya, dan bahawa kegagalan berbuat demikian terjumlah kepada kelalaian, yang mewajarkan penamatan. Oleh itu hujahan plaintif-plaintif berkenaan perkara ini, bahawa bayaran boleh ditangguhkan, satu salah faham dan tidak berasas di bawah keterangan dan undang-undang.

(6) Tanpa kewujudan kontrak kolateral atau representasi dan jaminan yang mengikat, dan berdepan dengan PJB berbentuk statutori yang mengikat, defendan berhak menamatkan PJB atas kegagalan plaintif-plaintif mematuhi tuntutan bil yang progresif. Tuntutan-tuntutan ini telah dikeluarkan dan dihantar kepada plaintif di alamat mereka di Australia seperti dalam PJB. Tiada balasan bagi invois-invois dan notis-notis yang dikeluarkan untuk bayaran, yang terjumlah sebagai pelanggaran jelas klausa-klausa dalam PJB. Oleh kerana pelanggaran tersebut tidak diperbetulkan, defendan terus menamatkan PJB, secara ketat mengikut kl. 10. Defendan tidak harus disalahkan kerana mematuhi terma-terma PJB. Terma-terma nyata PJB mengikat.

Case(s) referred to:

Chinaya Ganggaya v. Sentul Raya Sdn Bhd [2008] 3 CLJ 23 HC ***(refd)***

Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd [1997] 1 CLJ 287 CA ***(refd)***

Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals [2008] 4 CLJ 618 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 56(3)

Evidence Act 1950, s. 91

Housing Development (Control and Licensing) Regulations 1989, reg. 11(1), Sch H

For the appellant - Abdul Fareed; M/s VM Mohan Fareed & Co

For the respondents - Chan (Clement Cheng with him); M/s Albert & Assocs

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22NCVC-668-10-2011 (overruled)]

Reported by Suhainah Wahiduddin

JUDGMENT

Nallini Pathmanathan JCA:

Introduction

[1] This is an appeal against the decision of the learned judge of the High Court of Malaya in Penang, allowing the respondents' (the plaintiffs in the court below) claim for, *inter alia*, a declaration that the termination of a sale and purchase agreement dated 2 September 2010 ('the SPA') between the respondents and the appellant (the defendant in the court below) was null and void. The learned judge also allowed for damages to be assessed, on the basis that the respondents be returned to their original position prior to the termination of the SPA.

[2] For ease of reference, the respondents will be referred to as they were in the court below, namely as the plaintiffs, and the appellant as the defendant.

[3] The sale and purchase agreement in question related to the sale by the defendant, as vendor, to the plaintiffs as purchasers, of a unit in a condominium described as the 'One Ritz' project located in Georgetown, Penang. The defendant terminated the SPA on the grounds that the plaintiffs had failed to comply with their fundamental obligation to make progress payments as and when they fell due. After due notice to this effect, in accordance with the relevant contractual provisions, the SPA was terminated on 10 December 2011.

[4] The learned judge's finding was that the termination of the SPA was void on the grounds that the defendant's agent had made certain binding representations and assurances to the plaintiffs. The judge found that the SPA ought to be read together with these assurances and representations. In other words, the High Court effectively found that these representations and assurances were binding to the extent that they comprised a collateral contract, which sat alongside the SPA. However, the learned judge further found that the defendant, in breach of these binding representations, or the collateral contract, had failed to perform its obligations.

[5] The learned judge further found that as the defendant failed to call salient witnesses to deny or affirm the veracity or otherwise of these binding representations, the plaintiffs' case was the more probable of the two versions. In short, the learned judge accepted that there subsisted a collateral contract whereby the defendant agreed to an earlier date for delivery of vacant possession as well as the provision of other undertakings.

[6] We heard this appeal on 4 September 2014 and allowed the same with brief grounds. We append below our full grounds for allowing this appeal.

A **Salient Facts**

[7] The plaintiffs are citizens of Australia and reside there. They intended to make Penang their second home under the Malaysia My Second Home Programme. To this end, they engaged the services of property agents and were advised of several available properties. Eventually they were referred B to one Ms Elaine Khoo ('Khoo') who worked for a developer of a condominium project known as Kelawai View Condominium. Khoo advised them about this project and after procuring advice from their bankers and solicitors, the plaintiffs decided not to proceed with the purchase of a unit in the project, as they had been advised that it was a high risk purchase, due C primarily to the developer's financial status. This was in or around 7 October 2009.

[8] Subsequently, some time during August 2010, the plaintiffs received a call from Khoo, the defendant's agent, advising that the Kelawai View Condominium project had changed its name to 'One Ritz' and that new D directors had been appointed to the company. After making the requisite checks, the plaintiffs corresponded with Khoo with a view to purchasing a unit in 'One Ritz'. In the course of these negotiations, Khoo stated that the project would be completed by 2010. She sent an email dated 4 August 2010 to this effect. The purchase price of the unit in which the plaintiffs expressed E interest was negotiated down to RM2,920,000 from the initial purchase price of RM3,780,000.

[9] The plaintiffs then travelled to Penang and met up with Khoo and inspected the project. The plaintiffs were eager to purchase a unit in 'One Ritz' situated on the 24th floor, but required certain assurances. They were F concerned about the water tank and its ability to supply enough water to level 24. They also sought confirmation that the project would be fully completed by the end of 2010. According to the plaintiffs, Khoo agreed to issue a formal letter confirming that the capacity of the water tank was sufficient, and that the building would be completed by the end of 2010. However, no letter G from the defendant to this effect was issued.

[10] The plaintiffs had engaged a firm of solicitors in Penang to act for them in respect of this matter, namely Messrs Clement Dawn & Associates.

[11] On 19 August 2010 the plaintiffs paid an initial deposit of RM50,000 H to secure the purchase of one unit in the project described as parcel No: Unit 24-01 (type C) level 24 in the 'One Ritz' project, having an address at Lot 2262, Bandar Georgetown, Seksyen 4, Daerah Timur Laut, Penang ('the property').

[12] On 2 September 2010 a sale and purchase agreement was executed I between the plaintiffs and the defendant. They also executed a deed of mutual covenants. The plaintiffs paid the balance ten per cent deposit of RM242,000.

[13] It is of significance that the SPA was in the form of a statutory sch. H format under reg. 11(1) of the provisions of the Housing Development (Control and Licensing) Regulations 1989 promulgated pursuant to the Housing Development (Control and Licensing) Act 1966.

[14] The salient terms of this statutory form SPA provided, *inter alia*, as follows:

(a) Under cl. 4.1, the purchase price was to be paid by the plaintiffs to the defendant by instalments in the time and manner described in a schedule annexed to the SPA;

(b) Under cl. 10, in the event the plaintiffs failed to pay any instalment due under cl. 4.1 above, the defendant was entitled to terminate the SPA, after having given the plaintiffs not less than 14 days' notice in writing by AR. Registered post to treat the SPA as having been repudiated by them. The plaintiffs could rectify the breach within the stipulated 14-day period;

(c) Under cl. 8, time was stipulated to be of the essence of the contract in relation to all provisions of the SPA;

(d) Under cl. 25.1, vacant possession of the unit was to be delivered to the plaintiffs within 36 calendar months from the date of the SPA. As the SPA was signed on 2 September 2010, vacant possession under the SPA was only due to be delivered on or around 1 September 2013. It is evident that this is at odds with the alleged representation made by Ms Khoo, prior to execution of the SPA, that the building would be completed by the end of 2010;

(e) Under cl. 31, any notice, request or demand is deemed sufficiently served if it is sent by the party or his solicitors by registered post addressed to the other party's address (as specified in the SPA);

(f) All pertinent particulars relating to the identity of the plaintiffs, the purchase price and description of the property are set out in the sixth schedule to the SPA.

[15] As of the date of the execution of the SPA on 2 September 2010 therefore, there were no further representations or assurances in writing from the defendant to the plaintiffs.

[16] The documents disclose that the defendant then proceeded to issue progress payment requests as the building reached various stages of completion. These invoices were all addressed to the plaintiffs at the address stipulated in the SPA, namely an address in Australia. However, no further progress payments were made by the respondents, apart from the initial ten per cent deposit.

[17] On 21 September 2010, after the execution of the SPA, solicitors for the plaintiffs wrote to the defendant. Their letter stated as follows:

> We hereby confirm that you will deliver the job specification as per Sale and Purchase Agreement dated 2-9-2010 and the expected Completion Date shall be on December 2010.

[18] The letter in itself is a contradiction in terms as the SPA stipulated the date of completion as being September 2013, while in the same sentence the plaintiffs' solicitors sought confirmation that the building would be completed by December 2010. In any event, the purpose of the letter was to seek confirmation that the representation made by Khoo, prior to the execution of the SPA, was true, namely that the building would be completed by the end of 2010.

[19] There was no response from the defendant to this letter. The plaintiffs' solicitor, one Ms Dawn Shireen Lee Chao Chern, SP-2 ('Dawn') did not issue any reminder letters.

[20] In October 2010 Dawn called the defendant, more particularly Khoo, to remind her that the plaintiffs expected a written confirmation from the defendant. Khoo had left the defendant, but her position was taken over by one Chua Hooi Ying, SD-3, known as Jess ('Jess'). However no written confirmation followed.

[21] Dawn then set up a meeting on 2 December 2010 with Jess, one Jeffrey Tee Jie Hui, SD-1, the project manager of the defendant, and one Chow Tat Seng, the solicitor for the appellant. At the meeting the defendant's representatives did not agree to provide the requisite confirmation, merely stating that they would look into the matter.

[22] In the interim prior to this, the defendant had issued a notice dated 12 November 2010 to the plaintiffs directly, copied to their solicitors, advising that they were in breach of the SPA in that the plaintiffs had failed to make payments due, amounting in total to RM1,898,000. The plaintiffs were given 14 days to make good this default, failing which the defendant advised that the SPA would be terminated.

[23] As no response was received, the defendant proceeded to terminate the SPA *vide* letter dated 10 December 2012 which was sent to the plaintiffs' solicitors' office by AR Registered post.

[24] The plaintiffs' position in this regard as testified by the first plaintiff, Robert Geoffrey Gooch, SP-1 ('Gooch') was that the progress payments would only be paid when the defendant made good its representations by confirming the date of completion of the project, as well as providing them with the additional documents they had sought prior to entry into the SPA. Gooch further testified that he had been so advised by his lawyers. His lawyer, Dawn, SP-2, however, testified otherwise. There was nothing in

writing to confirm this arrangement. On the contrary the contractual position then prevailing was as set out in the SPA, which required strict compliance with the payment schedule.

[25] There was no immediate reaction from the plaintiffs or their solicitors to the termination. Instead on 15 December 2010, the plaintiffs' solicitors wrote again to the defendant referring to the 2 December 2010 meeting and asking for a confirmation that vacant possession would be delivered by the extended date of April 2011.

[26] On 16 December 2010 the defendant's solicitors replied to the plaintiffs' solicitors advising that no additional terms were acceptable other than that stipulated in the SPA.

[27] Then, some five months after the termination of the SPA, on 25 May 2011, the plaintiffs' solicitors wrote to the defendant's solicitors, challenging the termination and maintaining that it was the defendant that had failed to provide additional documentation as agreed. The plaintiffs maintained that they were shocked by the termination and the forfeiting of the deposit, which they held to be unlawful and unmerited.

[28] The defendant's solicitors replied on 31 May 2011, reaffirming their position, and denying that there was never any agreement in place to provide the respondents with the additional documentation other than as specified in the SPA. The defendant also referred to cl. 8 where time is expressed to be of the essence and reiterated that the plaintiffs had failed to make the progress payments due for stages 2(a) to (g), which amounted to a default pursuant to cl. 10 of the SPA. The defendant therefore maintained that the termination was lawful and valid.

[29] Eventually the plaintiffs initiated this action.

The Issues Before The High Court

[30] The parties had agreed upon no less than ten issues to be tried in the High Court. When condensed, the issues were essentially as follows:

(i) whether the representations and assurances made by the defendant through its agent were binding, such that these representations and assurances effectively amounted to a collateral contract;

(ii) whether there was a breach of these representations and assurances and/or undertaking and/or collateral contract;

(iii) whether the defendant had agreed to postpone the 'progress billing' payment until the representations and assurances/undertaking/collateral agreement was fulfilled;

(iv) whether the defendant was entitled to terminate the SPA and forfeit the deposit; and

(v) whether the SPA was still effective and binding on the parties, or put another way, whether the termination of the SPA was null and void.

A **The Decision Of The High Court**

[31] The learned judge found that the SPA was concluded against the backdrop of assurances and representations made by the defendant's agent, Khoo. His Lordship accepted the plaintiffs' contention that the balance purchase price was only payable once the additional documentation, which Khoo had represented would be provided, was duly furnished to the plaintiffs or their solicitors. The provisions of the statutory form SPA, which contained terms contrary to the representations and assurances given by Khoo, were not considered.

[32] The learned judge took cognisance of the fact that the termination of the SPA was for a failure to pay the progress payments as and when they fell due. He also noted that the evidence of the plaintiffs focused on events prior to the SPA while that of the defendant related to matters after the execution of the SPA.

[33] Ultimately however, the thrust of the judgment was that the defendant had failed to produce several salient witnesses, namely Khoo and one of the solicitors for the appellant, namely one Chow Tat Seng. Their evidence, His Lordship felt, was essential to ascertain the veracity or otherwise of the assurances and representations relating to the SPA. The learned judge held that the failure to call these witnesses sounded the death knell for the defendant's case, as a consequence of which the defendant was unable to rebut the plaintiffs' affirmative assertions relating to the representations and assurances given to them in relation to the sale and purchase of the property. As such, the plaintiffs' case was allowed, and the termination of the SPA declared to be null and void. As the property had been disposed of, the plaintiffs were awarded damages to be assessed, on the basis that they be returned to their original position prior to the termination of the SPA.

The Decision Of The Court of Appeal

[34] The appeal was allowed and the following brief grounds of judgment were delivered:

[35] The plaintiffs in this suit had sought a declaration that the termination of their SPA with the defendant was null and void. The plaintiffs maintain that there were representations which gave rise to a collateral contract prior to entry into the SPA. In this case the SPA was in the statutory form, ie Borang H, under the Housing Development (Control and Licensing) Act 1966. The defendant's ground for terminating the SPA is that the progressive payments due, were not paid by the plaintiffs, despite being billed.

[36] We find from a perusal of the appeal record that there is no evidence to indicate that the defendant had waived its entitlement to progress payments, which is a fundamental term of the contract.

[37] Although the learned trial judge found that there was a collateral contract, this related primarily to the date of delivery of possession and certain undertakings, which has no nexus to or bearing to the obligation of the respondents to make their progress payments timeously. Therefore upon failure to make such progress payments the defendant was entitled to terminate the agreement.

[38] Turning to the issue of the collateral contract we are conscious that the SPA in the instant case is a statutory form of contract, which has regulatory force. It is not clear whether a collateral contract can subsist side by side with a statutory form of contract. Further even if there can be such a collateral contract, its terms cannot be in direct conflict or contradict the terms of the statutory form.

[39] In the instant case the delivery date under the collateral contract and under the SPA are in direct conflict. There was no reservation of the earlier delivery date as asserted by the plaintiffs, not even when they executed the SPA. It is also arguable that as there was no such saving, the SPA constitutes the entire contract between the parties. We are constrained to allow the appeal and set aside the order of the High Court.

Analysis

[40] We augment our brief grounds with the following additional rationale.

(i) Can A Collateral Contract Subsist Alongside A Statutory Form Of Contract As Prescribed Under reg. 11 Of The Housing Development (Control And Licensing) Regulations 1989 In sch. H?

[41] The SPA between the respondents and the appellant, who is a housing developer, is governed by a statutory form of contract as prescribed in sch. H of the Housing Development (Control and Licensing) Regulations 1989 [PU(A) 58/1989] ('the regulations'). As such, the provisions in the SPA are not merely contractual, but are in effect statutory provisions, as they are actually provisions of sch. H of the Regulations, which have been imposed by law upon the parties.

[42] There appears to be no evidential or legal basis to justify the existence of representations or assurances that sit alongside this statutory form SPA, and which are binding on the parties, as the learned judge found. More accurately, there appears to be no basis either evidentially or legally to warrant a finding that a collateral contract subsists alongside the statutory form of contract that is the SPA. In this context it is not possible, with respect, to infer the existence of a collateral contract to subsist alongside the SPA. The SPA, which has statutory force, cannot, in other words, be effectively amended or varied by inferring the existence of a collateral contract subsisting alongside it.

[43] This point of law was considered in the case of *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors and Other Appeals* [2008] 4 CLJ 618. The specific issue that arose for consideration there was whether s. 56(3) of the Contracts Act 1950 ('CA 1950') could be read into or alongside the sch. H statutory contract prescribed by reg. 11(1) of the Regulations. In essence, the party propagating reliance on s. 56(3) of the CA 1950 argued that the said Act and subsidiary legislation made under it were designed to improve and supplement common law remedies and to that extent did not deprive a litigant of a contractual remedy not available under the Act or rules promulgated under it.

[44] Gopal Sri Ram JCA set out the position in law thus:

> ... In our opinion there is no merit in the appellant's argument. So far as s. 56(3) of the Contracts Act 1950 is concerned, it deals with contracts generally. The contract which has fallen for construction in the present cases is a special contract. It is prescribed and regulated by statute. While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence parties to a contract in Form H cannot contract out of the scheduled form. Terms more onerous to a purchaser may not be imposed. So too, terms imposing additional obligations on the part of a purchaser may not be included in the statutory form of contract ...

[45] It follows that provisions of the Contracts Act 1950 cannot be utilised to contract out of the terms of a statutory form contract, like the SPA. While it is evident from the foregoing passage and the legislation itself that the primary purpose is to protect purchasers and to control housing developers, it does not detract from the fact that a collateral contract cannot be said to sit alongside such a statutory form contract on the basis of mere representations and assurances, *albeit* by the defendant as housing developer or the plaintiffs as purchasers. In the instant case, the terms of the collateral contract (ie the representations) were in direct conflict with the express terms of the SPA. In these circumstances it is untenable to maintain, with respect, as the learned judge did, that the collateral contract prevailed over the statutory form contract, effectively amending and varying its content.

[46] Neither are the plaintiffs and the defendant entitled to vary and/or import any other terms or provisions of law in the construction of this statutory form of the SPA (see *Chinaya Ganggaya v. Sentul Raya Sdn Bhd* [2008] 3 CLJ 23). To that extent, we were again unable, with respect, to agree with the finding of the learned judge that there subsisted binding representations and assurances or a collateral contract alongside the statutory form SPA between the parties.

(ii) The statutory form SPA was executed subsequent to the oral representations and assurances

[47] Significantly the representations and assurances and/or collateral contract that the respondents seek to rely upon, are premised primarily on events which occurred prior to the execution of the SPA. Notwithstanding the veracity or otherwise of these representations, it is not in dispute that the respondents, who were legally represented at all material times, freely executed the statutory form of SPA on 2 September 2010, subsequent to these oral representations and assurances. The terms of the SPA clearly and expressly contradict the alleged collateral agreement or representations. Notwithstanding this, the plaintiffs did not seek to stipulate that the date of vacant possession was not 36 months after the execution of the SPA, but actually some considerable time earlier, namely at the end of 2010. Neither did they seek to have their concerns about the water tank clarified. In these circumstances, it is clear that the terms of the SPA, being subsequent to the representations and assurances, prevail and remain binding on the parties. As such, no effect can be given to any oral representation that the unit would be completed by either the end of 2010 or by April 2011. It is the time frame stipulated in the SPA that prevails.

Section 91 Of The Evidence Act 1950

[48] We agreed with learned counsel for the defendant that the transaction between the parties was a standard sale and purchase agreement, which was governed entirely by the provisions of the SPA. Section 91 of the Evidence Act 1950 precludes the adducing of oral or parol evidence for the purposes of ascertaining the terms of the contract. It is solely the contents of the SPA that amount to admissible evidence to construe the terms of the contract between the parties.

(iii) Was There Sufficient Evidential Basis To Conclude That A Collateral Contract Subsisted?

[49] In any event, there was a paucity of evidence to warrant the finding of a subsidiary or collateral contract. The total sum of evidence relating to the representations and assurances relied upon by the plaintiffs, comprised of a single email from Khoo in August 2010, oral representations prior to the SPA, and letters from Dawn, SP-2, to the defendant and its solicitors subsequent to the SPA. These matters are insufficient to support the subsistence of a collateral agreement. It is, in fact, evident from the meeting on 2 December 2010 that the defendant refused to concede to the existence of any collateral agreement when their representatives expressly stated that no such promise or assurance could be given and that they would merely 'look into the matter'. That cannot amount to a collateral contract.

[50] What then was the nett effect of the representations made by Khoo prior to the SPA? It would appear that they remained as oral representations, which were superseded by the binding terms of the SPA of 2 September

2010. It may have been exaggeration for the purposes of ensuring a sale, but to our minds, it cannot be construed as a binding representation of the date of delivery of vacant possession, since the said term, which is a fundament and integral term, was expressly set out in the SPA. As such these representations ought not to be construed as comprising a part of, or collateral to the written agreement between the parties.

(iv) Was There A Breach Of The Collateral Agreement?

[51] As we have concluded that no such collateral agreement did or could subsist alongside the SPA, it follows that there was no breach of the same.

(v) Had The Defendant Agreed To Defer The 'Progress Billing' Until The Representations And/Or Assurances Or The Collateral Contract Was Fulfilled?

[52] As stated above, Gooch testified that he had been advised that the progress billing had been effectively deferred until the representations and assurances given by the defendant, ie the collateral contract, had been performed. He further testified that he had been so advised by his solicitors. Dawn, SP-2, the solicitor, however, testified otherwise, maintaining that she had not given such advice to the plaintiffs. In the face of this clear contradiction it is evident that there was certainly no agreement in place to the effect that progress payments would be deferred, and that too, indefinitely. On the contrary, the express terms of the SPA (as set out above), point to the fact that time is of the essence, that progress payments had to be made on time, and that failure to do so would amount to a default, warranting termination. Therefore this contention of the respondents, namely that payments due were deferred, is misconceived and lacks basis both evidentially and legally.

(vi) Was The Defendant Entitled To Terminate The SPA And Forfeit The Deposit?

[53] It is evident from our analysis above that in the absence of any collateral contract or binding representation or assurance, and in the face of a binding statutory form SPA, the defendant was entitled to terminate the SPA for failure to comply with the progress billing demands. These demands were issued to the plaintiffs directly at the Australian address as specified in the SPA.

[54] There was no response to the invoices and notices issued for payment from stages 2(a) to 2(g) inclusive. This amounts to a clear breach of cls. 4.1 and 8, thereby justifying the defendant's notice to the effect that the SPA stood repudiated and according the plaintiffs 14 days to rectify such repudiatory breach. As the breach was not rectified, the defendant proceeded to terminate the SPA strictly in accordance with cl. 10.

[55] It follows that the defendant ought not to be faulted for strict adherence to the terms of the SPA. There was no evidence in the appeal record which suggested that the defendant had waived or agreed to waive the

strict requirement for compliance with the payment schedule. On the contrary, the express terms of the SPA, which were binding, provided otherwise.

[56] The obligation to make progress payments as and when they fall due comprises a fundamental term of the agreement between the parties. As stated in *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287 at p. 295; [1996] 3 MLJ 675 at pp. 681-682:

> ... Now in every contract, be it for the sale of land or any other commodity, there are, generally speaking, some terms that are of fundamental importance and others of less or minor importance. The law creates the distinction for the purpose of determining the kind of remedy that is to be made available to an innocent party, ie the party who is not guilty of a breach. Where the term that has been flouted is fundamental to the contract, the innocent party is entitled to treat himself as being discharged from further obligations under it. But where the obligation that has been breached is only subsidiary or minor in nature, the innocent party may not treat himself as being free of his obligations under the contract, although he may sue and recover damages for the non-performance of the subsidiary term. The rules that operate in this area of the law of obligations produce a further consequence. A party who terminates a contract or treats it as having come to an end in reliance upon the breach of a non-fundamental term is himself guilty of a breach of a contract.
>
> Whether a particular term is fundamental to the contract or merely a term of subsidiary importance depends very much on the way in which the particular contract is constructed. Nevertheless we think it is quite safe to state the principle in this way. In the absence of any special considerations in a contract for the sale of land, the obligation to pay the purchase price is a fundamental term. ...

[57] As the plaintiffs breached a fundamental term of the SPA, the defendant was entitled to terminate the same. This was expressly provided for in cl. 10 of the SPA. Given our conclusion, it follows that the SPA stood terminated as of 10 December 2010. As the SPA was validly terminated, we were unable, with respect, to agree with the finding of the learned judge that the termination was null and void. We were accordingly constrained to, and did allow the appeal with costs.